

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

61018

FILE: B-183891

DATE: June 23, 1976

MATTER OF: Continental Electronics Corp.

98407

## DIGEST:

1. In view of lack of written confirmation that protester orally protested to agency prior to June 24, 1975, and no protest having been filed in GAO until June 24, 1975, when protester knew grounds of protest not later than June 2, 1975, protest was untimely filed, since it was received more than 10 working days after basis was known.
2. Untimely protest will not be considered under "good cause" exception in Bid Protest Procedures, since protester has not indicated that there was anything beyond its control that prevented it from protesting timely, nor will it be considered under "significant issues" exception, since protests against award of negotiated contract on initial proposal basis considered in prior decisions and against offeror's responsibility are not considered to present significant issues.
3. Where offeror was afforded opportunity to revise proposal and did respond with additional information, negotiations were conducted.
4. Where letter requesting offeror to submit additional information conditioned request for "best and final" offer upon receipt of requested information and offeror failed to furnish all information requested to render proposal acceptable, condition for "best and final" offer was not met.
5. Where offeror's proposal is so technically deficient as to be considered outside competitive range, there is no obligation to hold discussions to improve proposal.
6. Determination that proposal is technically unacceptable is matter primarily within discretion of procuring agency and will not be questioned by GAO in absence of evidence that technical evaluations were without reasonable basis.

7. Protest against affirmative determination of responsibility by contracting agency is not for consideration on merits.

Continental Electronics Corp. (Continental) protests the award of contracts under requests for proposals (RFP) DAAB07-75-R-0475 and DAAB07-75-R-0447 by the United States Army Electronics Command (ECOM) to Star Manufacturing, Inc. (Star).

On February 21, 1975, RFP DAAB07-75-R-0475 was issued for the procurement of 1,350 telephone operators, TA-221/PT. This procurement was restricted to current or previous producers. Five offers were received, and the record discloses that Continental submitted the third lowest offer. Star submitted the low offer. The contracting officer states that after reviewing the proposals, he determined not to negotiate with any of the five offerors and to make an award based on the initial offers received. Since Star was the apparent low offeror, a preaward survey was requested on March 20, 1975. The contracting officer requested that the preaward survey of Star verify Star's claim to be either a current or past producer of the item.

The preaward survey, dated April 2, 1975, indicated that Star possessed a purchase order for 125 SB-22A/PT telephone switchboards of which the TA-221/PT is a subassembly. The preaward survey, in part, states:

"At the present time work is under way on an order for 125 switchboards, telephone, manual, SB-22A/PT, to be delivered to Associated Industries, North Hollywood, California. These switchboards will contain the bid item as a major assembly."

The survey concluded that Star was responsible in all respects. On May 28, 1975, contract DAAB07-75-C-0371 was awarded to Star.

Continental contends that an oral protest against award was made to the contracting officer on May 28, 1975. The contracting officer denies that any oral protest was lodged on May 28, 1975,

or during a June 2, 1975, meeting with Continental representatives. The contracting officer states that he was not aware of any protest until June 24, 1975. ASPR § 2-407.8(a)(1) (1974 ed.) provides that if an oral protest is filed with the agency and the matter cannot otherwise be resolved, written confirmation of the protest is requested. In view of the lack of any written confirmation that Continental protested to the agency prior to June 24, 1975, and no protest having been filed with our Office until June 24, 1975, when Continental knew the grounds of its protest not later than June 2, 1975, the protest was untimely filed, since it was received more than 10 working days after the basis for it was known. See Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1976) and Jarrell-Ash Division - Fisher Scientific Company, B-182322, November 22, 1974, 74-2 CPD 284.

Continental has suggested that the protest might be considered under Bid Protest Procedures section 20.2(c) which provides:

"The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

In 52 Comp. Gen. 20, 23 (1972), it was stated:

"\* \* \* 'Good cause' varies with the circumstances of each protest, although it generally refers to some compelling reason, beyond the protestor's control which has prevented him from filing a timely protest. \* \* \* 'Issues significant to procurement practices or procedures' refers not to the sum of money involved, but to the presence of a principle of widespread interest. We are not inclined to view a protest challenging the responsibility of a particular bidder as coming within this provision."

Continental has not indicated that there was anything beyond its control that prevented it from timely protesting the issues raised. The Continental protest is directed against the responsibility of Star and the award of a negotiated contract on an initial proposal basis. As indicated in the 52 Comp. Gen. decision, a protest against an offeror's responsibility is not considered to present a significant issue. Moreover, since the propriety of making an award on an initial proposal basis under section 10(g) of Standard Form 33A and the procurement regulations has been considered in prior decisions (e.g., Raytheon Company, B-184375, January 28, 1976, 76-1 CPD 55, and Halifax Engineering, Inc., B-184064, December 30, 1975, 75-2 CPD 414), that is not considered a significant issue either. Therefore, the untimely protest under RFP -0475 will not be considered.

Continental also protests the award made to Star under RFP -0447 for the production of 5,205 switchboards, SB-22A/PT. Continental contends that the procuring activity failed to conduct negotiations with it prior to rejecting its proposal as technically unacceptable and that it was not afforded the opportunity to submit a "best and final offer." The record does not support Continental's position. Specific deficiencies in Continental's proposal were noted in a letter dated March 4, 1975, and by letter of April 16, 1975. Continental was afforded the opportunity to revise its proposal and did submit additional information by letter dated April 25, 1975. Therefore, negotiations were conducted. 51 Comp. Gen. 102 (1971). The revised proposal was evaluated and it was determined that a major revision or a new proposal would be required for Continental's proposal to meet the specific criteria called for in RFP provision C.82, "Proposal Submission." Based on the recommendation of the members of the evaluation team and personal review of the revised proposal, the contracting officer determined on May 23, 1975, that the proposal was technically unacceptable. Thereafter, a request for best and final offers with a closing date of June 5, 1975, was sent to the seven technically acceptable offerors which did not include Continental. After evaluating the seven offers, award was made to Star on June 20, 1975.

By letter dated June 27, 1975, the contracting officer advised Continental that its proposal was determined to be unacceptable stating in part:

"The additional data you provided with your letter of 25 April 1975 did not resolve the deficiencies listed in my letter of 4 March 1975. You did provide the QA Plan, QA Manual, and Priced Bill of Materials. Your plans for implementing the Equipment Verification Review, resolving technical data conflicts, and estimating work required during production were not indicated in sufficient detail to prove to the undersigned that a careful evaluation of the work effort was made. A hard data analysis of the expected allocability of manhours was not present. Critical long lead items and specific tooling to be used in fabrication were not identified."

The letter also advised Continental that the award was made to Star.

The contracting officer's April 16, 1975, letter discloses that Continental's firm was afforded the opportunity to revise its technically unacceptable offer to correct the deficiencies previously cited. The letter stated:

"\* \* \* Request you submit all information required under the terms of the solicitation not submitted heretofore. Specific attention must be directed to those deficiencies cited in my letter of 4 March 1975. \* \* \*"

The letter further stated that "Technical and price negotiations and a request for 'best and final offer' will follow receipt of the requested information." The contracting officer states that the April 16, 1975, letter regretfully did not state that Continental's proposal, as revised by the additional information, had to be technically acceptable for negotiations to be continued. However, it was implicit from the quoted language in the April 16 letter that a request for a "best and final" offer was conditioned upon the receipt of the requested information. The record discloses that Continental's submission in response to the April 16 letter failed to furnish all the information requested to render its proposal acceptable. Since the information requested was not

B-183891

furnished, the condition for a "best and final" offer was not met. In the circumstances, the omission in the contracting officer's letter did not commit the Government to negotiate with Continental if its revised proposal remained outside the competitive range.

The contracting officer states that a major revision or a new proposal would have been required for Continental's proposal to meet the requirements in provision C.82 and to be favorably evaluated under the criteria in section D of the RFP. Since Continental's April 26, 1975, revised proposal remained technically unacceptable, no opportunity to permit Continental to submit a "best and final" offer was provided. It is well settled that "an offeror must demonstrate affirmatively the merits of its proposal," Kinton Corporation, B-183105, June 16, 1975, 75-1 CPD 365, and that it runs the risk of proposal rejection if it fails to do so clearly. See Programming Methods, GTE Information Systems, Inc., B-181845, December 12, 1974, 74-2 CPD 331. Where an offeror's proposal is so technically deficient and thus is not within the competitive range, there is no obligation to hold discussions to improve the proposal. Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 75-2 CPD 232; Essex Corporation, B-182595, April 23, 1975, 75-1 CPD 255.

The determination that Continental's proposal was technically unacceptable is a matter primarily within the discretion of the procuring agency and will not be questioned by our Office in the absence of evidence which would justify our Office in concluding that the technical evaluations were without a reasonable basis. The record in this case is devoid of any such evidence and therefore we find no legal basis to question the award to Star under the subject RFP. See Donald N. Humphries & Associates, et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275.

Continental's contention that Star has "never made this equipment or any other similar electronic equipment" relates to Star's responsibility. Our Office has discontinued the practice of reviewing bid protests against affirmative determinations of responsibility except in certain situations not applicable here.

B-183891

Great Lakes Dredge and Dock Company, B-185493, January 15, 1976,  
76-1 CPD 32. Accordingly, we will not consider the protest  
against Star's responsibility on the merits.

However, Continental's protest under RFP -0447 on the other  
grounds considered above is denied for the reasons stated.

  
Deputy Comptroller General  
of the United States